Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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AVAILABILITY OF BOUND VOLUMES
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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

General Notice

19 CFR Part 24

PROPOSED ADJUSTMENT TO AD VALOREM USER FEE FOR IMPORTED MERCHANDISE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of intent to adjust fee rate; request for comments.

SUMMARY: Notice is hereby given that Customs proposes to adjust the merchandise processing user fee on formal entries of imported merchandise at 0.19 percent ad valorem, pursuant to the Omnibus Budget Reconciliation Act of 1986.

DATE: Comments must be received on or before January 10, 1992.

FOR FURTHER INFORMATION CONTACT: Linda Walfish, User Fee Task Force, (202–566–8648).

ADDRESS: Comments (preferably in triplicate) must be submitted to and may be inspected at the Regulations and Disclosure Law Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2119, Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

Background

Section 8101 of the Omnibus Budget Reconciliation Act of 1986 (Pub. L. 99–509) (codified as 19 U.S.C. 58c), provided that, with certain exceptions, an ad valorem user fee was to be collected by Customs on formal entries of merchandise entered, or withdrawn from warehouse, for consumption, beginning on December 1, 1986. The fee was to be based on the appraised Customs value of the merchandise. The Act provided that the proceeds of the user fees were to be deposited in a dedicated account of the Treasury and, subject to authorization and appropriation, were to be used to offset Customs appropriations for the salaries and expenses of Customs incurred in conducting commercial operations.

The current merchandise processing fee is 0.17 percent ad valorem, subject to a maximum fee of $400 and a minimum fee of $21. T.D. 91–33, 56 FR 15036; 19 CFR 24.23(b)(1)(i)(A). However, pursuant to 19 U.S.C.

58c(a)(9)(B)(i), the Secretary of the Treasury can, under certain conditions, adjust the fee rate to a maximum of 0.19 percent ad valorem, in order to offset the salaries and expenses that will likely be incurred by Customs in the processing of formal entries and releases during the fiscal year in which such costs have been incurred.

Customs has projected that an increase is needed in order to offset the salaries and expenses which are being incurred in Fiscal Year (FY) 1992. In this regard, Customs has estimated the number of entries and releases expected to be processed during FY 1992, and has also estimated the value of FY 1992 imports. Estimates have also been made of the number of entries and releases, and their values, which would be subject to the minimum, ad valorem and maximum merchandise processing rates, as noted above. Specifically, for FY 1992, the Customs commercial costs are expected to be $726 million. The current fee is inadequate to generate sufficient revenues. At the 0.19 percent rate, it is anticipate that $527 million in fees will be generated. To elaborate, approximately $96 million will be lost due to statutory exemptions from the merchandise processing fee, and the remaining $105 million will not be recovered due to other statutory limitations. Merchandise processing revenues at the 0.19 percent rate would come close to offsetting the $726 million in costs, but when exempted categories of merchandise and fee adjustment restrictions are taken into consideration, a shortfall of approximately $200 million will still exist.

Accordingly, it is proposed to adjust the merchandise processing fee to 0.19 percent ad valorem on formal entries of imported merchandise which are subject to this fee.

Section 58c(a)(9)(B), as amended, 19 U.S.C. 58c(a)(9)(B), provides for a period of not less than 30 days within which to solicit public comment through a notice in the Federal Register, and to consult with the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives regarding the proposed adjustment. Upon the expiration of this period, notification to such committees of the final adjustment shall be made. Upon the expiration of the 15–day period following such notification, a notice of the final adjustment must be submitted for publication in the Federal Register, and any adjustment shall become effective with respect to formal entries and releases on or after the 15th day following publication.

COMMENTS

Before adopting the proposed increase in the merchandise processing fee rate, Customs will give consideration to any written comments (preferably in triplicate) that are timely submitted. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on normal business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations and Disclosure Law Branch, Room 2119,

Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C.

DRAFTING INFORMATION

The principal author of this document was Russell Berger, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: December 9, 1991.

NANCY L. WORTHINGTON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, December 11, 1991 (56 FR 64680)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Parts 19, 111, 112, 122, and 146

PROPOSED CUSTOMS REGULATIONS AMENDMENTS CONCERNING SUBMISSION OF FINGERPRINTS

AGENCY: Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes amendments to various parts of the Customs Regulations to clarify Customs position regarding the submission of fingerprints when applying for certain occupations or requesting various identification cards. It is further proposed that, when permissible, a fee will be collected to recover both the fee now charged Customs by the Federal Bureau of Investigation for performing the fingerprint check, and Customs administrative costs. The proposals, if adopted, will allow Customs to continue providing, in a cost-effective manner, services which necessitate a fingerprint records check.

DATE: Comments must be received on or before January 10, 1992.

ADDRESS: Comments (preferably in triplicate) should be addressed to the Regulations and Disclosure Law Branch, U.S. Customs Service, 1301 Constitution Avenue, N.W., Room 2119, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Esther Mandelay, Office of Inspection and Control (202) 566–2140.

SUPPLEMENTARY INFORMATION

Background

Pursuant to a provision in Pub. L. 101–162, the Federal Bureau of Investigation (FBI) was authorized to establish a fee for processing fingerprint identification records for non-law enforcement employment and licensing purposes. The authorization is mentioned in a note to 28 U.S.C.A. § 534 and indicates that the provision concerning fees was reenacted in Pub. L. 101–515.

On January 1, 1990, the FBI began charging Customs a $14.00 user fee whenever the fingerprints of various applicants for Customs related occupations or for identification cards are submitted for processing. On October 1, 1990, the fee was raised to $17.00. Customs sought exemp-

tion from the fee, but the FBI denied the request on the basis that the underlying reason for the check was employment or licensing purposes.

The amendments proposed in this document would allow Customs to charge a fee to recover the $17 charged us by the FBI, plus an additional 15% of that amount to cover Customs administrative overhead. Customs may assess such a fee pursuant to 31 U.S.C. 9701. Accordingly, the current charge would be $19.55, $17 (the FBI fee) plus $2.55 (15% to cover overhead). The fee will change whenever the amount charged by the FBI changes. District directors will inform those required to submit the fee of the correct amount.

On an annual basis, the Customs Airport Security Program alone, pursuant to discretionary authority to require fingerprints, submits to the FBI approximately 60,000 fingerprint cards from individuals requesting unescorted access to Customs security areas. Several thousand other fingerprint checks are required by other programs. As a result, Customs will be billed more than $1 million per year by the FBI for fingerprint checks which are considered necessary to carrying out Customs responsibilities. Accordingly, Customs has determined that the proposed amendments to various sections of the Customs Regulations described below will allow Customs to recover both the approximately $1 million per year we will be billed by the FBI, and Customs administrative costs.

Additionally, the proposals include statements indicating whether submission of fingerprints is a required part of a particular application process, or whether it is a matter for the district director's discretion.

Amendments are proposed to the following sections:

§ 19.2 Application to bond; bond; annual fee. This section refers to the application required of an owner or lessee desiring to establish a bonded warehouse facility. It is proposed to amend the section by adding that submission of fingerprints may be required of applicants. Further, if the applicant is actually a business entity, provision is made for obtaining fingerprints from the individuals operating the business.

§ 111.12 Application for license, § 111.96 Fees. Section 111.12 refers to the application required of those seeking to be licensed as customs brokers. It is proposed to amend the section by adding that submission of fingerprints may be required of applicants either at the time of filing the application or after the applicant obtains a passing score on the broker examination. The fingerprint processing fee will only be collected from successful examination takers. This will avoid the administrative burden of returning the fee to unsuccessful applicants since their fingerprints are not submitted to the FBI for processing. Also, § 111.96 would be amended to add the fingerprint fee to the other fees mentioned.

§ 112.42 Application for identification card. The submission of fingerprints is already stated as a mandatory part of the application for an identification card for cartmen, lightermen, and each employee thereof who receives, transports, or otherwise handles imported merchandise

which has not cleared Customs custody. The amendment proposed to § 112.42 states that fingerprints submitted with such an application must be accompanied by a fee to cover the FBI charge and Customs administrative cost.

§ 122.182 Security provisions. It is proposed to amend this section to make submission of fingerprints a mandatory part of the application process for those seeking an identification card, strip or seal used to gain unescorted access to the Customs security areas at an airport. Further, the proposal would require the submission of the appropriate fee to accompany the application.

§ 146.6 Procedure for activation. This section refers to the application required of a zone operator or grantee seeking to activate a Foreign Trade Zone. It is proposed to amend the section to add that submission of fingerprints, either from an individual or operators of a business, may be required of applicants.

Pursuant to 19 U.S.C. 58c(e)(6)(C)(i) and (ii), Customs is precluded from collecting any fee, other than those specifically provided for, in connection with the designation or operation of any bonded warehouse, or in connection with the activation or operation of a Foreign Trade Zone. Accordingly, a fingerprint processing fee may not be collected in those situations. In the remaining situations, a fee may be assessed and collected.

COMMENTS

Before adopting these proposals, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations and Disclosure Law Branch, Room 2119, U.S. Customs Service Headquarters, 1301 Constitution Avenue, N.W., Washington, D.C.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) it is certified that, if adopted, the proposed amendments will not have a significant impact on a substantial number of small entities. Accordingly, the proposals are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was John E. Doyle, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 19

Customs duties and inspection, Imports, Exports, Surety bonds, Warehouse.

19 CFR Part 111

Customs duties and inspection, Imports, Administrative practice and procedures, Brokers.

19 CFR Part 112

Customs duties and inspection, Imports, Administrative practice and procedures, Common carriers, Exports, Freight forwarders, Motor carriers.

19 CFR Part 122

Customs duties and inspection, Imports, Air carriers, Airports.

19 CFR Part 146

Customs duties and inspection, Imports, Exports, Foreign-trade zones.

PROPOSED AMENDMENTS

It is proposed to amend the Customs Regulations as set forth below.

PART 19 – CUSTOMS WAREHOUSES, CONTAINER STATIONS AND CONTROL OF MERCHANDISE THEREIN

1. The general authority citation for Part 19 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1624.

2. It is proposed to amend § 19.2(f) by adding the following text to the end of that paragraph.

§ 19.2 Application to bond; bond; annual fee.

* * * * * * *

(f) * * * The district director may require an individual applicant to submit fingerprints on Standard Form 87 at the time of filing the application, or in the case of applications from a business entity, may require the fingerprints, on Standard Form 87, of all officers and managing officials of the business entity.

* * * * * * *

PART 111 – CUSTOMS BROKERS

1. The authority citation for part 111 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1624, 1641, unless otherwise noted.

* * * * * * *

Section 111.96 also issued under 31 U.S.C. 9701.

2. It is proposed to amend § 111.12 by adding text to the end of paragraph (a) to read as follows:

§ 111.12 Application for license.

(a) * * * Fingerprints of the applicant may be required on Standard Form 87 at the time of filing the application, or after the applicant obtains a passing score on the broker examination.

* * * * * * *

3. It is proposed to amend § 111.96(a) by revising the paragraph heading and adding a sentence at the end to read as follows:

§ 111.96 Fees.

(a) *License fee; fingerprint fee.* * * * Applicants receiving notice that they achieved a passing score on an examination are then liable for payment of a fingerprint fee. The district director will inform the applicant of the current Federal Bureau of Investigation user fee for conducting fingerprint checks and the Customs administrative processing fee, the total of which must be paid to Customs before further processing of the application will occur.

* * * * * * *

PART 112 – CARRIERS, CARTMEN, AND LIGHTERMEN

1. The authority citation for Part 112 continues to read as follows:

Authority: 19 U.S.C. 66, 1551, 1565, 1623, 1624.

2. It is proposed to amend § 112.42 to read as follows:

§ 112.42 Application for identification card.

An application for an identification card required pursuant to § 122.41 of this chapter, shall be filed personally by the applicant with the district director on Customs Form 3078 together with two $1\frac{1}{4}'' \times 1\frac{1}{4}''$ color photographs of the applicant. The fingerprints of the applicant shall also be required on Standard Form 87 at the time of filing the application. The district director will inform the applicant of the current Federal Bureau of Investigation user fee for conducting fingerprint checks and the Customs administrative processing fee, the total of which must be tendered with the application. The application may be referred for investigation and report concerning the character of the applicant.

PART 122 – AIR COMMERCE REGULATIONS

1. The authority citation for Part 122 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1433, 1436, 1459, 1590, 1594, 1623, 1624, 49 U.S.C. App. 1509.

2. It is proposed to amend § 122.182 by revising the fifth sentence of paragraph (d) and adding a sentence immediately thereafter. The remainder of the paragraph is unchanged. The revised paragraph would read in pertinent part as follows:

§ 122.182 Security provisions.

* * * * * * *

(d) * * * The fingerprints of the applicant will be required on fingerprint card form FD–258 at the time of filing the application. The district director will inform the applicant of the current Federal Bureau of Investigation user fee for conducting fingerprint checks and the Customs administrative processing fee, the total of which must be tendered with the application. * * *

* * * * * * *

PART 146 – FOREIGN TRADE ZONES

1. The general authority citation for Part 146 continues to read as follows:

Authority: 19 U.S.C. 66, 81a–81u, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1623, 1624.

2. It is proposed to amend § 146.6 by adding the following text to the end of paragraph (a).

§ 146.6 Procedure for activation.

(a) *Application.* * * * The district director may also require the operator or grantee to submit fingerprints on Standard Form 87 at the time of filing the application. If the operator is an individual, that individual's fingerprints may be required. If the operator or grantee is a business entity, fingerprints of all officers and managing officials may be required.

* * * * * * *

CAROL HALLETT,
Commissioner of Customs.

Approved: November 13, 1991.
PETER K. NUNEZ,
Assistant Secretary of Treasury.

[Published in the Federal Register, December 11, 1991 (56 FR 64580)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

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* Acting as Chief Judge, effective May 1, 1991, pursuant to 28 U.S.C. § 253d.

Decisions of the United States Court of International Trade

(Slip Op. 91–105)

NMB SINGAPORE LTD., PELMEC SINGAPORE LTD., AND NMB CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, TORRINGTON CO. AND FEDERAL-MOGUL CORP., DEFENDANT-INTERVENORS

Court No. 89–06–00342

Plaintiffs contest the use of ball bearing parts in the calculations of home market viability for ball bearings from Singapore. Plaintiffs also assert that the ITA improperly included related party transfers in those calculations.

Held: The ITA's decision not to use the home market for less than fair value price calculations was not in accordance with law and is remanded.

The decision to include related party transfers in the viability determinations was in accordance with law and is affirmed.

[ITA determination is affirmed in part, and remanded.]

(Dated November 26, 1991)

Tanaka, Ritger & Middleton (*Michele N. Tanaka, Alice L. Mattice* and *Michael J. Brown*) for plaintiffs.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jeanne E. Davidson*); of counsel: *John D. McInerney*, Senior Counsel, *Douglas S. Cohen, Craig R. Giesse, Diane M. McDevitt, Stephanie J. Mitchell* and *Maria Solomon*, Attorney-Advisors, Office of the Chief Counsel for Import Administration, Department of Commerce, for defendant.

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr.* and *Lane S. Hurewitz*) for The Torrington Company, defendant-intervenor.

Frederick L. Ikenson (*Frederick L. Ikenson, J. Eric Nissley* and *Larry Hampel*) for Federal-Mogul Corporation, defendant-intervenor.

OPINION

TSOUCALAS, *Judge*: Plaintiffs, NMB Singapore, Ltd., Pelmec Singapore, Ltd. and NMB Corporation (collectively, "NMB"), move pursuant to Rule 56.1 of the rules of this Court for partial judgment upon an agency record to contest the final determinations of the Department of Commerce, International Trade Administration ("Commerce" or "ITA") in *Final Determination of Sales at Less Than Fair Value: Ball Bearings and Parts Thereof From Singapore*, 54 Fed. Reg. 19,112 (1989). In particular, plaintiffs contend that the ITA erred in including ball bearing parts in its calculation of the viability of the Singapore home market for NMB's ball bearings. Plaintiffs also assert that the ITA improperly included related party transfers of parts in the viability cal-

culations when there were no comparable sales of parts to unrelated parties.

BACKGROUND

Defendant-intervenor The Torrington Company ("Torrington") filed a petition on March 31, 1988 requesting that the ITA impose antidumping duties on all imports of antifriction bearings and parts thereof, except for tapered roller bearings, from a number of countries, including Singapore. General Administrative Record ("GAR") (Public) Doc. 1. In the course of the ensuing investigation, the ITA determined that NMB's home market for ball bearings in Singapore was not an appropriate market to compare to the United States market for purposes of calculating the dumping margin. Thus, the ITA resorted to using NMB's sales in a third country, Japan, to determine the margin. On May 15, 1989, the ITA published an antidumping duty order for ball bearings and parts thereof from Singapore, setting an estimated weighted average margin of 25.08% on NMB's merchandise. 54 Fed. Reg. at 20,907.

DISCUSSION

A final antidumping determination by the Department of Commerce will be affirmed unless that determination is not supported by substantial evidence or is otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is relevant evidence that "a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States*, 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988).

I. *Inclusion of Parts in Viability Calculations:*

In the course of an antidumping investigation, Commerce must determine if the imported merchandise in question was sold in the United States during the period of investigation at less than fair value. 19 U.S.C. § 1637d(a)(1) (1988). In doing this, the ITA compares the United States price of the goods to their foreign market value ("FMV"), and the amount by which FMV exceeds the U.S. price is the dumping margin. 19 U.S.C. § 1673e(a)(1) (1988). Determining FMV requires that the ITA choose which foreign market sales to use for comparison pursuant to a statutory and regulatory hierarchy. *U.H.F.C. Co. v. United States*, 916 F.2d 689, 692 (Fed. Cir. 1990).

Ideally, FMV is the price "at which such or similar merchandise is sold * * * in the principal markets of the country from which exported," that is, the home market of the firm. 19 U.S.C. § 1677b(a)(1)(A) (1988). However, if the ITA determines that the merchandise is not sold in the home market, or if

> the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other than the United States as to form an inadequate basis for comparison, then the price at which [such or similar merchandise is] so sold or offered for sale for exportation to countries other than the United States,

shall be the foreign market value. 19 U.S.C. § 1677b(a)(1)(B) (1988). In certain cases, even such "third country sales" may be an inappropriate basis for determining FMV, in which case the ITA may use "constructed value." 19 U.S.C. § 1677b(a)(2) (1988); 19 C.F.R. § 353.4(a) (1990);[1] *see Kerr-McGee Chemical Corp. v. United States*, 14 CIT ____, ____, 741 F. Supp. 947, 950 (1990).

Home market sales generally are considered too small if they constitute less than five percent of the quantity sold in countries other than the United States. 19 C.F.R. § 353.4 (1988). In that case, since the home market is not "viable," FMV must be calculated by alternative means, that is, by using either third country sales or constructed value. 19 U.S.C. § 1677b(a).

Plaintiffs' complaint is that the ITA wrongly included parts of bearings in its calculation of the viability of NMB's home market for ball bearings; that is, the ITA considered ball bearing parts to be merchandise which is "such or similar" to finished ball bearings, and that this caused NMB's home market sales to fall below the regulatory benchmark of 5% of its non-U.S. sales.

The government's response is that it tested viability based on the five classes or kinds of bearings under investigation (ball bearings, spherical roller bearings, cylindrical roller bearings, needle roller bearings and spherical plain bearings) rather than on the such or similar merchandise categories normally compared. The reason was that the variations in characteristics of the such or similar merchandise selected by Commerce would have made it "necessary to conduct several hundred viability tests." *Memorandum of the United States In Opposition to Plaintiffs' Motions for Partial Judgment Upon the Agency Record Regarding Certain Fundamental Issues* ("Defendant's Memorandum") at 135. Consequently, all sales of antifriction bearings fitting within one of the five classes of bearings, as well as all sales of parts of those bearings, were compared together. Thus, sales of ball bearings and parts of ball bearings in Singapore were divided by sales of ball bearings and parts of ball bearings in all non-U.S. markets, and the resulting percentage was less than 5%.

NMB claims this was unfair and improper because almost all of its sales of ball bearing parts were to its Thai sister company, NMB/Pelmec Thailand, and NMB did not sell parts in the home market. Since each part was treated as if it was equal to each finished bearing, dividing home market sales by non-U.S. sales yielded a figure of less than 5%. The government asserts that it tested parts with finished bearings under each of the five classes of bearings because it would have been wrong to recognize the distinction between finished bearings and parts, and not recognize the hundreds of permutations among bearings based on other characteristics such as outside diameter. *Defendant's Memorandum* at 158; *see* 54 Fed. Reg. at 19,021.

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[1] A similar regulation is now found at 19 C.F.R. § 353.48(a) (1991).

In *SKF USA, Inc. v. United States*, 15 CIT ___, 762 F. Supp. 344 (1991), a related case, this Court affirmed the decision to test viability based on the five classes or kinds, but remanded the case on the issue of testing both finished bearings and parts together. *SKF*, 15 CIT ___, 762 F. Supp. at 351–52. The Court concurs that, given the large number of variations in merchandise and the unique complexity of the bearings investigations, testing viability based on the five classes was appropriate. However, within each class or kind, the ITA should have tested parts separately from finished bearings, where there was no uniform indication of how many parts comprise a bearing, and where the sale of each part was treated the same as the sale of each bearing. *See* GAR (Pub.) Docs. 283 at 2, 327 at 5–6. The distinction between a finished product and its component parts is fundamental and it would not have sabotaged the class distinctions favored by Commerce for the ITA to have tested parts and finished bearings separately.[2]

Commerce is afforded great latitude in the choice of methodology to be employed in antidumping investigations. *Mitsubishi Elec. Corp. v. United States*, 12 CIT 1025, 1050, 700 F. Supp. 538, 558 (1988), *aff'd*, 898 F.2d 1577 (Fed. Cir. 1990). However, the methodology must be a "reasonable means of effectuating the statutory purpose" and the guiding objective of the law must not be contravened. *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 965–66 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987).

While the "complex facts" of this case permit Commerce to test viability based on the five classes of bearings, they do not justify the decision not to test parts separately from finished bearings. The result would have been just five more viability tests, not "several hundred," and a more accurate determination of the status of the home market would have ensued. Given the lack of data as to how many parts comprise an average bearing, and the consequent equation of one part to one bearing, the decision to treat parts and completed bearings as such or similar merchandise was not reasonable and was not in accordance with either the letter or the spirit of 19 U.S.C. § 1677b(a)(1)(A).

However, during the investigations, Commerce did in fact respond to the complaints of the few importers whose home markets of finished bearings and parts thereof were found to be non-viable, by testing the viability of finished bearings alone. NMB was such an importer, and the results of the re-testing were that NMB's home market sales of *finished* ball bearings constituted more than 5% of its total non-U.S. sales of finished ball bearings. Singapore Administrative Record ("SAR") (Confidential) Doc. 12 (Attachment 25); Fed. Reg. at 19,022.

Nonetheless, the ITA decided to disregard these results and use NMB's third country data in the price comparisons. The first reason given was that NMB's "submissions on value and volume of sales data were inconsistent with respect to which parts were reported and on

[2] For example, while a finished ball bearing with a six inch outside diameter may be similar to one with a four inch diameter, a ball or cage is not similar to a finished bearing of any size.

what basis (*i.e.*, date of shipment vs. date of purchase order) they were reported." 54 Fed. Reg. at 19,022. Second, the ITA stated that the increase in the home market's percentage of total non-U.S. sales was not significant, even though the percentage went from under the 5% benchmark to over it. Id.; SAR (Conf.) Doc. 12 (Attachment 25). The ITA explained that, because of these reasons, it could not be confident of the viability of the home market and thus third country data from Japan was used instead. Defendant's Memorandum at 140.

The Tariff Act of 1930, as amended, states a statutory preference that home market sales be used, unless they are too small for comparison. 19 U.S.C. § 1677b(a)(1). Commerce's own regulations require that it pursue other markets for comparison only when the home market accounts for less than 5% of its total non-U.S. sales. 19 C.F.R. § 353.4 (1988). The ITA is obliged to follow its regulations unless it provides a compelling reason for departure. *See Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *Airmark Corp. v. F.A.A.*, 758 F.2d 685, 692 (D.C. Cir. 1985); *Western Conference of Teamsters v. Brock*, 13 CIT ___, ___, 709 F. Supp. 1159, 1169 (1989); *ILWU Local 142 v. Donovan*, 9 CIT 620, 625 (1985), *reh'g denied*, 10 CIT 161 (1986). The fact that the increase in the home market's share of total sales was only slight is not a compelling reason, where the percentage did surpass the regulatory benchmark.

The other reason, that the home market data was ambiguous and inconsistent, is a more potent argument. However, the *Final Determination* indicates that the "inconsistent" reporting was only with regard to the sales of parts. 54 Fed. Reg. at 19,022.[3] Once parts are removed from the equation, this inconsistency will dissipate. Therefore, this reason is inapplicable to the viability of the home market for finished ball bearings. There being no other stated reason why the home market for finished ball bearings was not used for price comparisons, the Court finds that Commerce's decision not to use the home market for comparison was not in accordance with law.

Accordingly, the Court remands this case to the ITA with instructions that it use NMB's home market sales data for finished ball bearings from Singapore in the price comparisons for purposes of the less than fair value determination. The ITA shall also determine the viability of NMB's home market for ball bearing parts in a separate calculation. The ITA shall make any further adjustments to the final determination as these changes may require.

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[3] The *Final Determination* states that NMB's "submissions on value and volume of sales data were inconsistent with respect to which *parts* were reported and on what basis (*i.e.*, date of shipment vs. date of purchase order) they were reported." 54 Fed. Reg. at 19,022 (emphasis added).

The inconsistency in the sales data for parts is due to NMB's initial reporting of that data based on shipment dates, and then its later reporting based on purchase order dates. 54 Fed. Reg. at 19,024. The government claims that this inconsistency "made it unclear which sales actually were being reported as being within the period of investigation and, therefore, which quantities should be included in the viability calculations." *Defendant's Memorandum* at 161. Hence, the government concludes that these ambiguities made that home market data unreliable.

II. *Related Party Transfers:*

NMB also asserts that the ITA improperly used related party transfers in the viability calculations. Commerce's regulations state that

> If such or similar merchandise is sold * * * in the home market or, as appropriate, to third countries, to a person related to the seller of the merchandise in any of the respects described in section 771(13) of the Act, *the price at which such or similar merchandise is sold * * * to such person ordinarily will not be used in the determination of foreign market value* unless such sales are demonstrated to the satisfaction of the Secretary to be at prices comparable to those at which such or similar merchandise is sold to persons unrelated to the seller.

19 C.F.R. § 353.22(b) (1988) (emphasis added).[4]

All of plaintiffs' sales of parts were to a related party. *See* SAR (Conf.) Doc. 12 (attachment 25). Thus, plaintiffs assert that these sales should be disregarded since there were no sales to unrelated parties which could serve to determine if the related party transfers were at arms length.

The Tariff Act makes no mention of related party transfers in the context of the viability analysis and the regulation cited above does not call for exclusion of such transfers from the viability calculations. Related party transfers *must* be excluded only from actual price comparisons, not from the home market viability tests. This is because the viability test seeks only to determine the level of market activity in a given country, no whether that activity was at arms length. The arms length determination is relevant only to the LTFV comparisons. Hence, the ITA's decision to include related party transfers in the viability computations was in accordance with law and in affirmed.

CONCLUSION

The Court holds that the determination by the ITA to test the viability of plaintiff's home market for ball bearings and parts of ball bearings together was not in accordance with law and is remanded. The Court finds that Commerce's decision to depart from its regulation requiring use of the home market in LTFV calculations where the home market's percentage of total non-U.S. sales is equal to or greater than 5% was not in accordance with law. Accordingly, the ITA is instructed to use home market sales in the price comparisons for finished ball bearings, and to make any further adjustments to its final determinations and antidumping duty order as that change requires.

Additionally, the ITA is instructed to test the viability of the home market for ball bearing parts separately from that for finished ball bearings, and to make any further changes to its determinations as necessary.

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[4] A similar provision is now found at 19 C.F.R. § 353.45 (1991).

The Court further finds that the ITA's use of related party transfers in the calculations of home market viability was in accordance with law and is affirmed.

(Slip Op. 91–106)

THREE STAR TAILORING CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 89–10–00591

[Plaintiff's motion to suspend is denied]

(Dated November 26, 1991)

MEMORANDUM OPINION AND ORDER

Fitch, King and Caffentizis, (*Richard C. King*) for plaintiff.
Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Civil Division, United States Department of Justice, (*Bruce N. Stratvert*) for defendant.

MUSGRAVE, *Judge*: Plaintiff moves the Court pursuant to Rule 84 to suspend this case under *Enron Oil Trading and Transportation Co. v. United States*, No. 87–09–00934, Slip Op. 91–91 (Sept. 27, 1991). The government opposes the motion. The Court finds the governments position persuasive, and denies plaintiff's motion without prejudice.

Rule 84(d) requires the movant to include in his motion a concise statement of the issue of fact or question of law alleged to be the same in the two cases. Plaintiff's motion states that the common question in this case and *Enron* is "whether the subject entries [were] liquidated by operation of law pursuant to 19 U.S.C. § 1504(a)."

The precise issue in *Enron* was whether the government had provided the plaintiff therein with notice required by 19 U.S.C. § 1504(b) (1980) that the period for liquidation had been extended. *Enron*, at 2. Nothing before the Court today indicates that notice is an issue in this case.

Accordingly, plaintiff's motion to suspend this case under *Enron Oil Trading and Transportation Co. v. United States*, No. 87–09–00934, Slip Op. 91–91 (Sept. 27, 1991) is hereby denied.

(Slip Op. 91–107)

TOSHIBA CORP., TOSHIBA AMERICA, INC., AND TOSHIBA HAWAII, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 90–04–00209

OPINION

Plaintiffs move for judgment on the administrative record, challenging the Department of Commerce determination not to revoke the antidumping published in T.D. 71–76 with respect to them. *Held*: Plaintiffs motion is denied, the determination of the Department of Commerce is affirmed.

(Dated November 26, 1991)

Squire Sanders & Dempsey, (*Robert H. Huey, William D. Kramer, Dana M. Stein, Jackie M. Huchenski, Miriam A. Bishop*) for plaintiffs.

Frederick L. Ikenson, P.C. (*Frederick L. Ikenson, J. Eric Nissley*) for defendant-intervenor Zenith Electronics Corporation.

Collier, Shannon & Scott (*Paul D. Cullen, Laurence J. Lasoff, Mary T. Staley*) for defendant-intervenors the United Electrical Workers of America, Independent; the International Brotherhood of Electrical Workers; the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers; and the Industrial Union Department, AFL-CIO.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director Commercial Litigation Branch, Civil Division, United States Department of Justice, (*Jeanne E. Davidson*) for defendant.

MUSGRAVE, *Judge*: Plaintiffs Toshiba, *et al.*, challenge the determination of the Department of Commerce not to revoke the antidumping finding T.D. 71–76 with respect to Toshiba. *Television Receivers, Monochrome and Color, From Japan; Determination Not to Revoke In Part*, 55 Fed. Reg. 11420 (March 28, 1990). The Court has jurisdiction under 28 U.S.C. 1581(c) (1991). Plaintiffs' motion for judgment on the agency record is denied, and the determination by Commerce with respect to Toshiba is affirmed.

BACKGROUND

In 1971, the Department of the Treasury published a finding that television receivers from Japan were being sold at less than fair value ("LTFV") in the United States. *Television Receiving Sets, Monochrome and Color, From Japan*, 36 Fed. Reg. 4,597 (March 10, 1971). In 1983, the Department of Commerce published its tentative determination to revoke T.D. 71–76 with respect to Toshiba based on the facts that Toshiba had not sold televisions for less than fair value or had not shipped televisions from Japan to the United States from April 1, 1979 until March 31, 1982, and had agreed to reinstatement of the antidumping finding if there were indications it made LTFV sales following revocation.

On January 24, 1990, Commerce published the final results of its administrative review of T.D. 71–76. *Television Receivers, Monochrome and Color, From Japan*; *Final Results of Antidumping Duty Adminis-*

trative Review, 55 Fed. Reg. 2,399 (January 24, 1990). Commerce stated in the notice that Toshiba had satisfied some of the requirements for revocation under 19 C.F.R. 353.54(b) (1988), but that there was insufficient evidence on the record to determine whether there is no likelihood of resumption of sales at less than fair value.

After giving interested parties an opportunity to comment on that one issue, Commerce concluded that it was not satisfied that there was no likelihood of resumption of sales by Toshiba at LTFV, and determined not to revoke the antidumping finding with regard to Toshiba. *Television Receivers, Monochrome and Color, From Japan; Determination Not To Revoke In Part*, 55 Fed. Reg. 11,420, 11,422 (March 28, 1990).

Toshiba challenges Commerce's determination not to revoke the antidumping finding on four grounds. First, by refusing to consider evidence that Toshiba would not resume shipments from Japan, Commerce unlawfully narrowed the test of 19 C.F.R. § 353.54(a) (1988) ("the regulation"), which states in part that Commerce must be "satisfied that there is no likelihood of resumption of sales at less than fair value." Second, Commerce construed "no likelihood" too restrictively, and required Toshiba to show that there was no possibility of such sales. Third, Commerce's refusal to consider company-specific information in the form of Toshiba's plans not to ship televisions to the U.S. from Japan was improper. Lastly, Toshiba argues that the determination is based on general market factors and relies on assumptions unsupported by substantial evidence.

Standard of Review

Section 751(c) of the Tariff Act of 1930 commits the decision to revoke an antidumping duty order to the unfettered discretion of the Department of Commerce: "The administering authority *may* revoke, in whole or in part * * * an antidumping duty order * * * after investigation under this section." 19 U.S.C. 1675(c) (1991) (emphasis added). Commerce regulations vest this broad discretion to determine whether or not to revoke in the Secretary of Commerce.

> Whenever the Secretary determines that sales of merchandise subject to an Antidumping Finding or Order * * * are no longer being made at less than fair value * * * *and is satisfied that there is no likelihood of resumption of sales at less than fair value,* he *may* act to revoke or terminate, in whole or in part, such Order of Finding * * *.

19 C.F.R. § 353.54(a) (1988) (emphasis added).

The language of the regulations indicates that the Secretary is not compelled to grant revocation even when plaintiffs satisfy the requirements for revocation. *Matsushita Electric Industrial Co. v. United States*, 12 CIT 455, 463, 688 F. Supp. 617, 623 (1988) *aff'd*, 861 F.2d 257, 7 Fed. Cir. (T) 13 (1988).

The Court shall hold the determination unlawful if it finds the determination to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. 1516a(b)(1)(B) (1991). However, the Court "must accord substantial weight to an agency's in-

terpretation of a statute it administers." *Zenith Radio Corporation v. United States*, 437 U.S. 443, 450–51, 98 S. Ct. 2441, 2445, 57 L.Ed.2d 337, 343 (1978). Commerce has broad discretion in enforcing the trade laws and the decision whether to revoke an antidumping order does not depend on the weight of the evidence, but on the expert judgment of the International Trade Administration based on the evidence of record. *Manufacturas Industriales De Nogales, S.A. v. United States*, 11 CIT 535–36, 666 F. Supp. 1562, 1567 (1987).

ANALYSIS

Toshiba contends that Commerce unlawfully narrowed the standard of § 353.54(a) when it stated that "Many of Toshiba's arguments in support of revocation are intended to demonstrate that it has no incentive to resume shipments from Japan. However, the Department's concern is not whether shipments would resume, but whether dumping would occur in the event that Toshiba were to resume shipments." *Determination Not to Revoke*, 55 Fed. Reg. 11,420 11,422 (March 28, 1990).

Toshiba argues as follows. If there are no further shipments to the United States there can be no sales at less than fair value. Therefore, a showing that there is no likelihood of future shipments should satisfy the test. Commerce abused its discretion because it disregarded Toshiba's evidence that it had no incentive to ship televisions to the United States from Japan.

The Court disagrees. While it cannot be disputed that if there are no shipments there will be no sales at LTFV, the regulation does not require Commerce to consider evidence that sales will not occur. A revocation proceeding is inherently predictive, and rarely, if ever will Commerce be able to predict with certainty what will occur upon revocation. *See Matsushita Electric Industrial Co., Ltd. v. United States*, 750 F.2d 927, 933, 3 Fed. Cir. (T) 44, 51 (1984). Toshiba does not argue that it cannot export televisions from Japan, nor has it foresworn such exports indefinitely.

Rather, Toshiba argues that it has no economic incentive to resume such exports. Such indications of incentive are often ambiguous. For example, Toshiba presented evidence that it is more expensive to manufacture television in Japan than in the United States. While this is a disincentive to export televisions to the United states from Japan, it also makes it more likely that if shipments occur, they will be at LTFV.

The regulation does not present an objective criterion for determining whether there is no likelihood of resumption of LTFV sales. Instead, the petitioner must establish this fact to the satisfaction of the Secretary. This Court does not review whether the evidence presented must satisfy the Secretary, but only whether the determination is lawful and supported by substantial evidence on the record. In assessing to its own satisfaction whether there is no likelihood of sales at less than fair value, Commerce may lawfully focus on whether any sales, if made, would be at LTFV, and disregard evidence of incentives not to resume shipments.

This reading of the regulation is not inconsistent with Article 9 of the International Antidumping Code, which provides in part that "An antidumping duty shall remain in force only so long as, and to the extent necessary to counteract dumping which is causing injury." *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*, Apr. 12, 1979, 31 U.S.T. 4919, 4933, T.I.A.S. No. 9650, 1160 U.N.T.S. 204. When there is evidence that LTFV sales would occur if shipments were to resume, and no evidence that shipments *cannot* occur, it is not unreasonable to conclude that an antidumping duty order is necessary to counteract dumping.

Toshiba also argues that Commerce construed the word "likelihood" in an unreasonably restrictive manner that does not comport either with its dictionary definition or with past administrative practice. "Likelihood," means the state of being likely, Toshiba contends, and as in the context of an initial antidumping investigation under 19 U.S.C. § 1673(a) (1991), Commerce should apply a "likelihood of resumption" test that considers whether a resumption of LTFV sales is imminent or can reasonably be expected. *See Kerr-McGee Chemical Corp. v. United States*, 14 CIT ___, 739 F. Supp. 613, 622–24 (1990). Instead, Commerce unreasonably based its determination on a mere potential for LTFV sales.

This argument simply ignores the language of § 353.54(a). Unlike 19 U.S.C. § 1673(1), which requires a determination that a class of merchandise "is being, or is likely to be," sold at LTFV, the regulation premises Commerce's discretion to revoke upon the Secretary's satisfaction that there is *no likelihood* of resumption of LTFV sales. The Secretary need not affirmatively find that LTFV sales are likely to be unsatisfied that there is no likelihood of LTFV sales. *Kerr-McGee* and other cases construing 19 U.S.C. § 1673 are therefore inapposite.

Toshiba further contends that Commerce's determination is inconsistent with *Final Results of Antidumping Duty; Administrative Review and Revocation in Part; Pressure Sensitive Plastic Tape from Italy*, Fed. Reg. 6,031 (Feb. 21, 1990) and similar determinations. In *Pressure Sensitive Tape*, Commerce revoked an antidumping finding based on a history of no shipments and a statement agreeing to suspension of liquidation and reinstatement of the finding if circumstances developed indicating that LTFV sales were occurring.

In making the determination to revoke the finding for pressure sensitive tape, Commerce specifically distinguished cases such as the one at bar, stating,

> Unlike the situations presented in *Television Receiver, Monochrome and Color, from Japan; Final Results of Anitdumping Duty Administrative Review and Determination Not to Revoke* (54 FR 35517, 35519 (1989)) * * * there is no evidence on the record in this case that the respondent will resume sales at dumped prices subsequent to revocation.

Pressure Sensitive Tape, 55 Fed. Reg. at 6032.

The analysis Commerce performed in the determination at bar relies explicitly upon *Television Receivers, from Japan*, 54 Fed. Reg. 35,517 (1989), distinguished in the *Pressure Sensitive Tape* determination. Finding that Toshiba's company specific price data was insufficient to evaluate the likelihood that Toshiba would resume LTFV sales, Commerce turned to an examination of competitive pricing pressures and market conditions.

Commerce noted that its analysis of pricing and market conditions in *Television Receivers, from Japan*, 54 Fed. Reg. 35,417 (1989), had indicated that it would be difficult for Hitachi and Sanyo to resume shipments to the United States without selling at LTFV, and conclude that those conditions had not changed sufficiently to alleviate this concern with respect to Toshiba. These pricing and marketing conditions did not exist in the *Pressure Sensitive Tape* determination,land the determination at bar is not inconsistent with it.

Similarly, the other determinations cited by Toshiba either specifically state that there was no evidence of any likelihood of resumption of LTFV sales, *e.g., Choline Chloride from Canada; Final Results of Antidumping Administrative Review*, 54 Fed. Reg. 41,316 (Oct. 6, 1989), or simply do not mention any such evidence. *E.g., Elemental Sulfur from Canada; Final Results of Antidumping Duty Administrative Review and Revocation in Part*, 55 Fed. Reg. 13,179 (April 9, 1990). Like *Pressure Sensitive Tape*, they are not inconsistent with the determination at bar.

Toshiba also argues that Commerce should have based its determination upon company specific information rather than an analysis of market conditions. Commerce acknowledged in its determination that its practice is to first examine company specific data, but found that the company specific data available for Toshiba was insufficient for evaluating the likelihood of future LTFV sales.

Commerce found the data insufficient for three reasons. First, data used by Commerce in calculating zero dumping margins for three prior periods was nearly seven years old. Second, information showing that Toshiba had increased its United States market share while selling a fair value was based on televisions manufactured in the United States, and there was no evidence that if the televisions had been imported from Japan that they would not have been sold at LTFV. Lastly, Toshiba failed to provide any data on its Japanese home market prices for comparison with its United States prices.

Toshiba maintains that the age of the data from the annual review investigations is a result of delay by Commerce, and should not prevent its use. Although it is unfortunate that the administrative reviews have taken so long, *See Sharp Corp. v. United States*, 13 CIT ____, 725 F. Supp. 549, 550 (1989) (describing litigation surrounding T.D. 71–76 as "bar wars"), Toshiba has had and made use of the opportunity to submit additional data prior to the final determination. The conclusion that data that was seven years old was insufficient to evaluate the likelihood

of future LTFV sales was both lawful and supported by the record. *Compare UST, Inc., v. United States*, 831 F.2d 1028, 1033, 6 Fed. Cir. (T) 1, 6 (1987) (extent to which post-tentative revocation data are required is a matter of discretion).

Toshiba next argues that it was not possible to submit evidence that the televisions it sold in the United States would not have been sold at LTFV if they had been shipped from Japan, because Toshiba did not ship televisions from Japan during that period. Toshiba cites *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, ____ Fed. Cir. (T) ____ (1990), for the proposition that Commerce may not reject a company-specific analysis because of Toshiba's failure to provide information that does not exist. *Olympic Adhesives* held that Commerce may not resort to the "best information available" under 19 U.S.C. § 1677e(c) (1990) when a producer in an antidumping duty investigation cannot provide information requested by the International Trade Administration because such information never existed.

Olympic Adhesives is inapposite. Commerce did not request information that does not exist from Toshiba. Toshiba admits that it not only manufactures televisions in Japan, but performs its own LTFV analysis upon designs before it decides whether or not to produce a model in Japan. The fact that the televisions referred to by Commerce were not manufactured in Japan does not mean that it was impossible to provide information on whether such televisions could have been produced in Japan and sold in the United States at fair value.

Toshiba further argues that its home market prices cannot validly be compared with United States prices because Toshiba prices its televisions in Japan without regard to prices in the United States market. Toshiba claims that what its home market and United States prices would be if it did resume exports to the United States cannot be determined. Again citing *Kerr-McGee*, 739 F. Supp. at 623, Toshiba argues that the likelihood of dumping must be based upon actual transactions or offers for sales, not upon speculation about what its home market prices would be if it did ship televisions to the United States.

Toshiba's argument ignores the predictive nature of the revocation proceeding. The revocation proceeding was conducted at Toshiba's request and it was for Toshiba to come forward with "real evidence" to persuade Commerce to revoke the order. *Manufacturas Industriales De Nogales, S.A. v. United States*, 11 CIT at 535, 666 F. Supp. at 1566 (1987). Access to Toshiba's home market prices would have made Commerce's assessment less speculative, not more so. The fact that Toshiba believes that its home market prices would not be persuasive does not imply that Commerce improperly conclude that Toshiba's data was insufficient without them.

The Court concludes that Commerce's determination that the company specific data for Toshiba was insufficient to satisfy Commerce that there was no likelihood of resumption of sales at LTFV was both lawful and supported by substantial evidence.

Finally, Toshiba contends that in basing its determination on general market factors, Commerce relied upon assumptions that are not supported by substantial evidence in the record.

Commerce found that many of the market conditions noted in its determination to revoke T.D. 71–76 with respect to Hitachi and Sanyo in *Television Receivers, Monochrome and Color, From Japan; Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke in Part*, 54 Fed. Reg. 35,517 35,519 (Aug. 28, 1989), still exist, and rejected the argument that Toshiba is not affected by these conditions because of its high-end marketing strategy. These market conditions include the facts that substantial dumping margins had been found recently for several other Japanese companies exporting televisions to the United States, that competition in the United States market was also affected by imports from other countries such as Korea and Taiwan (many at LTFV), the high cost of production in Japan and the high value of the yen. Commerce conceded that the yen had declined somewhat since the determination, but not sufficiently to eliminate its concern about resumption of LTFV sales by Toshiba.

Toshiba responds that "the record demonstrates that Toshiba can and will sell at fair value when other Japanese producers do not," and that its high-end market strategy and domestic production compel the conclusion that it is unaffected by the market pressures noted by Commerce.

Commerce also noted that Toshiba and other Japanese companies are conducting a large amount of research and development of new technologies such as LCDs, some of which Commerce has determined to be within the scope of T.D. 71–76, and predicted that televisions based on these technologies will be exported from Japan to the United States. Toshiba counters that its and other Japanese companies' investments in LCD and other technologies do not indicate that televisions based on these technologies will be exported from Japan to the United States, or that if they are, that Toshiba will do so.

Toshiba's arguments urge this Court to reweigh the evidence before the ITA, which the Court cannot do. The conclusions Toshiba disputes are supported by substantial evidence upon the record. Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619–20, 86 S. Ct. 1018, 1026–27, 16 L.Ed.2d 131 (1966) quoted in *Matsushita Electric*, 750 F.2d at 933. It means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, taking into account the entire record, including whatever fairly detracts from the substantiality of the evidence." *China National Arts and Crafts Import and Export Corporation v. United States*, 15 CIT ____, 771 F. Supp. 407, 409 (1991). "The standard is not *de novo*." *Kerr-McGee*, 14 CIT at ____, 739 F. Supp. at 620.

The focus of Commerce's determination was not whether Toshiba could sell televisions that it manufactured in the United States competitively, but whether it could sell televisions it manufactured in Japan competitively in the United States without selling them at LTFV. Toshiba's domestic production capacity does not bear upon this question. The conclusion that the high-end of the market is not immune from competition is also not without support, as Toshiba's own submissions indicate that other manufacturers compete in the large (over 26 inch) screen market it refers to as "high-end." And while the zero dumping margins found for Toshiba during the first, fourth and partial fifth review periods are some evidence that Toshiba can import televisions without dumping, this evidence is not conclusive.

Similarly, Commerce's conclusions concerning new technologies for televisions are not without support in the record. Toshiba is a large manufacturer of televisions, and concedes that it has invested in LCD's and other technologies which it admits have real potential for use in televisions. Evidence in the record showed Toshiba to be the second largest LCD manufacturer in Japan. A reasonable person could conclude that Toshiba will manufacture such televisions in Japan and export them to the United States.

The Court concludes that Commerce's determination not to revoke the antidumping duty order with respect to Toshiba was lawful, and supported by evidence on the record. Plaintiff's motion for Judgment on the agency record is denied, and the case is dismissed.

However, the Court is sensitive to plaintiff's desire to be spared the onus of the existing antidumping order, and perceives that the government's reluctance to revoke the order is due to its uncertainty as to Toshiba's future conduct. This litigation has a long history, and it would benefit all involved if it could be put to rest in an orderly fashion. To that end,the Court requested at oral argument that the parties attempt to reach an accommodation, perhaps involving some representations or undertaking on the part of Toshiba, which could form the basis for a stipulated judgment. Accordingly, should the parties notify the Court by December 5, 1991 (thirty days after judgment was announced at oral argument) that they are attempting to reach such an accommodation, the Court will order a rehearing of the case or consider the forthcoming stipulations. Otherwise, the order of dismissal shall become final.

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